

117362

20635

Maris

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-199209

DATE: January 26, 1982

MATTER OF: Reservation Industries, Inc.

DIGEST:

1. There is no discretion or authority in officers or agents of the Government to waive provisions of statute.
2. Bid determined to be unreasonably high cannot be said to be that of otherwise successful bidder which is entitled to voluntarily reduce its price after bid opening.
3. Only purely voluntary and unsolicited price reductions may be accepted from otherwise successful low bidder; negotiation or solicitation of lower offers is not permissible. Consequently, Housing Authority acted reasonably by not negotiating with any low bidder on various schedules contained in solicitation in effort to reduce bidders' prices.

Reservation Industries, Inc. has filed a complaint against the cancellation of an invitation for bids (IFB) issued by the Fort Belknap Indian Housing Authority for the construction of two housing projects in Harlem, Montana. The construction was to be financed by the Department of Housing and Urban Development (HUD) pursuant to an annual contributions contract (ACC). We find no merit to the complaint.

The solicitation provided as follows:

"Separate bid proposals will be included in this set of specifications as follows:

1. Proposal I -- Mt. 10-13,
Scattered Sites Water and Sewer Systems
2. Proposal II -- Mt. 10-14, Site
Improvements and Utilities for Hays
and Mission Canyon Subdivision
3. Proposal III -- Mt. 10-13, 15
Mutual Help Dwelling Units
4. Proposal IV -- Mt. 10-14, 20
Low Rent Dwelling Units
5. Proposal V -- Combined Lump Sum
bid consisting of Proposals I, II,
III, IV

The award will be made to a qualified bidder submitting a responsive low bid as follows: Low bid in Proposal I, II, III, and IV or to Proposal V which is a combined lump sum bid consisting of Proposal I, II, III, IV, provided the combined bid in Proposal V is lower than sum of low bids in Proposals I, II, III, and IV."

The Housing Authority received one bid under Schedule (Proposal) I, three under Schedule II, one under Schedule III, three under Schedule IV and one lump sum bid under Schedule V. The sum of the low bids on Schedules I - IV was lower than the lump sum bid on Schedule V. Reservation Industries was the low bidder on Schedule IV.

The construction costs under Schedules III and IV, however, were subject to the following limitation, as provided for in section 6(b) of the United States Housing Act of 1937, as amended (42 U.S.C. § 1437d(b) (1976), as amended, Pub. L. No. 96-399, § 201(c) (Oct. 8, 1980)):

"Every contract made pursuant to this [Act] for loans (other than preliminary loans) or annual contributions shall provide that the cost of construction and equipment of the project (excluding land, demolition and nondwelling facilities) on which the computation of any annual contributions under this [Act] may be based shall not exceed by

more than 10 per centum the appropriate prototype cost for the area. The prototype costs shall be determined at least annually by the Secretary * " *,"

The only bid on Schedule III exceeded the established prototype cost by 28.8 percent and the maximum limit allowed by law by almost 19 percent. Therefore, the Housing Authority could not accept the bid.

In the apparent belief that under the solicitation as written it was required to award on each of the individual schedules and could not make a partial award on Schedules I, II and IV, the Housing Authority next considered the lump sum bid. It determined, however, that this bid was unreasonably priced because it exceeded the Government's cost estimate for the work by 13.2 percent. Consequently, the Housing Authority canceled the solicitation and resolicited.

Reservation Industries does not challenge the Housing Authority's interpretation of the solicitation. It contends, however, that award nevertheless should have been made to the low bidders on each of the individual schedules, and that the Housing Authority and HUD are estopped from relying on the statutorily imposed cost limitation as a justification for canceling the solicitation. Reservation Industries argues that this provision was waived by the actions of the Housing Authority, which allegedly entered into negotiations with the lump sum bidder in an attempt to bring its Schedule III price within the statutory cost limitation. The HUD Regional Office allegedly concurred in this action.

At the outset, we note that there is nothing in the record to support the allegation that the Housing Authority entered into negotiations with the lump sum bidder to bring its Schedule III price within the cost limitation, or even that its Schedule III price exceeded the limitation. Further, the only evidence concerning the HUD Regional Office's position is that it disapproved of any negotiations with the lump sum bidder and so notified the Housing Authority.

In any event, since the cost limitation was imposed on the Housing Authority itself by its ACC with HUD, we fail to see how the requirement was subject to waiver by the Housing Authority. Rather, any such waiver would have to be made by HUD officials, and this they did not have the authority to do. The cost limitation was required to be

included in the ACC by statute, and there is no discretion or authority in officers or agents of the United States to waive any provision of statute. Harry L. Lowe & Associates, 53 Comp. Gen. 620 (1974), 74-1 CPD 96.

Reservation Industries also argues that rather than canceling the solicitation, the Housing Authority should have negotiated with each of the low bidders on the individual schedules to bring their prices down to an acceptable level. However, there is nothing in the record to suggest that the Housing Authority found any of the individual bids, other than that on Schedule III, to be unreasonably priced. Further, we would consider any such action in regard to any of the low bidders on any of the schedules to be improper since this was an advertised rather than a negotiated procurement.

In support of its position, Reservation Industries cites two decisions of this Office, B-74013, March 9, 1948 and B-159412, July 26, 1966, aff'd, September 6, 1966. In this regard, we note that Federal procurement law is not per se applicable to a contract entered into with Federal funds by a recipient of such funds. Nevertheless, we have held that the grantee must comply with those principles of Federal procurement law which go to the essence of the competitive bidding system. Concrete Construction Company, B-194077, June 7, 1979, 79-1 CPD 405.

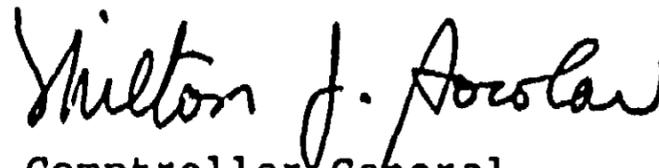
Reservation Industries cites B-74013 and B-159412, supra, for the proposition that a contracting agency may accept a price modification from a low bidder submitting an "otherwise acceptable bid." We have held, however, that a bid determined to be unreasonably high cannot be said to be that of the "otherwise successful [or acceptable low]" bidder which is entitled to voluntarily reduce its price after bid opening. Strand Aviation, Inc., B-194411, June 4, 1979, 79-1 CPD 389. Also pertinent is 45 Comp. Gen. 228 (1965), which overrules B-74013, supra, to the extent it is inconsistent with that decision, and holds that while the Government may accept the benefit of a voluntary reduction in the price of an otherwise acceptable low responsive bid, this principle is not for application where the bid prices received after formal advertising are unreasonably

high. Our decision in B-159412, supra, is not to the contrary; the price of the low bidder who was permitted to reduce its price in that case was not found to be unreasonably high.

In addition, Reservation Industries fails to recognize that only purely voluntary and unsolicited price reductions may be accepted from the otherwise successful bidder. The negotiation or solicitation of lower offers is not permissible. B-158528, April 26, 1967; B-157055, February 17, 1967; 45 Comp. Gen. 228, supra. Therefore, we find no basis on which to conclude that the Housing Authority acted unreasonably by failing to negotiate with any of the low bidders in an effort to reduce their prices.

Reservation Industries also requests reimbursement for the costs of preparing its bid. In view of our conclusions above, there is no basis upon which to consider such a claim. Consequently, it is unnecessary to decide whether a bidder on a grantee procurement can recover bid or proposal preparation costs. E.D.S. Federal Corporation, B-190036, May 11, 1978, 78-1 CPD 359.

The complaint is denied.



Acting Comptroller General
of the United States